United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7244

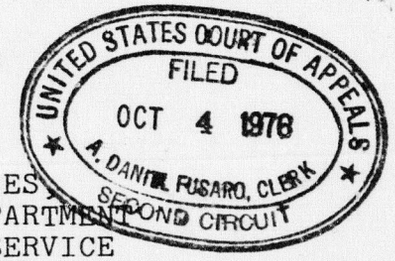
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

IRVIN GILL, ROBERT ZIEGLAR, KATHERINE HARRIS, MARIE FITZHUGH, CHARLES CAMPBELL, INEZ PAGE, DOROTHY DOBSON, RAVELLA FLOYD, INEZ CHARLES, EVELYN FAIRWELL, ALICE ZEALY, GEORGE HOLMES, ENOCH MORRISON, RUBY BLACKWELL, ROSIE LEE SAILES, BETTY JO TRAVIS, DOROTHY LATHAM, LUTHER ROBINSON, ELADIA FUENTES, VELMA WILLIAMS, DOLORES ALLEN, VIVIAN SILAS, BEATRICE HILL, SALENA MATHEWS, ANNIE HICKS, HARRIET WEATHERS, LINDA GAFFNEY, GRACE RUTHERFORD, DORETHA DIGGS, STELLA HOLMES MCDONALD, DAISY MAE BANKS, MICHELLE COURNOYER, LUZ MARTINEZ, MARIE WARE, ALBERTA FERGUSON, SADIE JOHNSON, Individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants



-vs-

MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, JAMES REED, DIRECTOR OF MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, MONROE COUNTY CIVIL SERVICE COMMISSION, OFFICE OF CIVIL SERVICE & PERSONNEL OF MONROE COUNTY, FRED LAPPLE, EXECUTIVE DIRECTOR, OFFICE OF CIVIL SERVICE & PERSONNEL OF MONROE COUNTY, GABRIEL RUSSO, DIRECTOR OF HUMAN RESOURCES OF MONROE COUNTY AND MONROE COUNTY,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF AUTHORITIES CITED

ARGUMENT

POINT I

THE COMPLAINT STATES CLAIMS OF EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§1981 AND 1983 AND THE UNITED STATES CONSTITUTION; ALL CLAIMS HAVE BEEN TIMELY FILED

The thrust of appellees' argument to affirm dismissal of plaintiffs' claims focuses on a "rewriting" of the complaint in question. While the plaintiffs detail very specifically that they were all employees of the defendants and/or prospective employees of the defendants at the time of their filing their claims of department-wide, continuing employment discrimination, defendants persist in their briefs to characterize the allegations as merely isolated incidences of discrimination. While plaintiffs enumerate that their claims of discrimination against defendants include excluding minority persons from certain job classifications, denying equal pay to minority employees, discriminatorily recruiting employees, discriminatorily excluding minorities from training opportunities, discriminatorily transferring and promoting employees, discriminatorily denying minorities titles, discriminatorily administering tests for employment, discriminatorily manipulating provisional appointments and retaliating against employees who complain of discrimination, for example, defendants persist in suggesting that they are

not sufficiently informed of the plaintiffs' complaints- the allegations are too "conclusory."[1]

Appellees' arguments simply ignore the rule of law that when a motion such as the one they made in this case to dismiss is made, all allegations of the complaint must be accepted as true, the complaint must be given its most favorable reading, the complaint may not be dismissed unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle him/her to relief. Conley v. Gibson, 355 U.S. 41 (1957); Egelston v. State University College at Geneseo, Slip Opinion No. 1050, Second Circuit, June 7, 1976; Noble v. University of Rochester, Slip Opinion No. 1115, Second Circuit, June 7, 1976.

With the citation of Griggs v. Duke Power Co., 401 U.S. 424 (1971), Robinson v. Dallas, 514 F.2d 1271 (5th Cir. 1975) and Peters v. Jefferson Chemical Co., 516 F.2d 447 (5th Cir. 1975), for example, appellees confuse authority

[1]Defendants even suggest that plaintiffs have failed to make any allegation that the defendants have intentionally discriminated. However, in paragraph 45 of the complaint plaintiffs have clearly alleged intentional discrimination as follows: "The defendants have consistently and purposefully limited and deprived potential and present employees of the Monroe County Department of Social Services on the basis of race, color, sex, and national origin, of their rights guaranteed to them under the United States Constitution and federal law, with the intent and design both directly and indirectly of fostering and protecting the advancement of white employees, to the detriment of minority employees."

which discusses what is necessary proof on trial of an employment discrimination case after completion of all discovery with what are sufficient allegations for the initial complaint.[1] As the pleadings now stand, every material issue in this lawsuit is in dispute between the parties. Despite defendants' assertions that their denials of discrimination ought exonerate them from liability no judgment can be entered in their favor. "Summary judgement should be entered only when the pleadings, depositions, affidavits and admissions filed in the case 'show that ...there is no geniune issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citations Omitted.]" Poller v. C.B.S., 368 U.S. 464, 467 (1962).

One of the material issues in dispute between the parties is whether the defendants have discriminatory hiring practices. Defendants attempt to treat the Equal Employment Opportunity Commission's observation respecting "general hiring practices" as a complete exoneration to the charge. While it is evident from a full reading of the

[1] In light of the detail included in plaintiffs' complaint, there is no basis for appellees' argument that the complaint is deficient because the allegations are "conclusory." In any event, even where this court has found allegations of a complaint to lack necessary detail, the court has not dismissed the claim but has allowed the filing of an amended complaint. Avins v. Mangum, 450 F.2d 932 (2nd Cir. 1971).

Commission's finding of reasonable cause in favor of the plaintiffs that no such conclusion is justified, plaintiffs dispute defendants' representations as to total numbers of minorities employed. (A. 304-306.) While the Commission has not so found, even if the Commission had found "no reasonable cause" on any issue raised before it, plaintiffs are still entitled to a full hearing on all their charges of discrimination in the federal district court. Gamble v. Binghamton Southern R.R. Co., 514 F.2d 678 (5th Cir. 1975).

In examining the sufficiency of plaintiffs' claims under Title VII of the Civil Rights Act of 1964 and the timeliness of filing those claims, defendants misapply the holdings of the Supreme Court in Brown v. General Services Administration, ____U.S._____, 96 S. Ct. 1961, 48 L.Ed. 2d 402 (1976) and Washington v. Davis, _____U.S._____96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). In Brown, the court held that Title VII is the exclusive remedy for federal employees who have claims of employment discrimination against the federal government. This case has no bearing on the present case; there are no federal employees or federal employment involved. This case is one of the numerous employment discrimination cases that have been successfully brought against a local government employer by its employees pursuant to Title VII or the other relevant statutes, 42 U.S.C. §§1981 and 1983 or the Constitution. The authority previously cited by the

plaintiffs at pages 15-20 is good law.

The jurisdictional bases for Washington v. Davis were the Fifth Amendment of the Constitution and 42 U.S.C. 1981. The Constitution and one of the civil rights acts provided the bases for suing the government entity just as the Constitution and some of the civil rights acts provide separate and independent jurisdictional bases for this lawsuit.

As previously noted, plaintiffs complain of continuing employment discrimination. They were all employees of the defendants at the time of complaining to the Equal Employment Opportunity Commission or they had just unsuccessfully sought employment with the defendants. Plaintiffs have sought and are continuing to seek employment opportunities and redress from the employment discrimination.[1] Plaintiffs filed their claims of employment discrimination while the discrimination was yet in progress-in fact it continues to date- well within 300 days of the occurence of the last act

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[1] There is no basis in the record for the defendants' assertion that they have now adequately promoted the plaintiffs and have cured any past employment discrimination. Even if this were true, plaintiffs are entitled to recover the damages for the past discrimination. Gamble v. Binghamton Southern R.R. Co., 514 F.2d 678 (5th Cir. 1975).

of discrimination as provided in Title VII.[1]

In their arguments, defendants confuse the question of whether a plaintiff has filed the complaint within the statutory time period, measured from the last act of discrimination, and the period of time which a court will review upon hearing an employment discrimination claim and determining appropriate relief for the discrimination. Courts will look to the present, continuing effect of pre-act discrimination in fashioning relief, Gamble v. Binghamton Southern R.R.Co., supra, as well to discrimination that occurs after the filing of the complaint. Nance v. Union Carbide Corp., 397 F.Supp. 436 (D.C.N.C. 1975).

There is no basis in law for defendants' assertion that plaintiffs need exhaust further administrative remedies prior to pursuing this lawsuit. There is no administrative remedy that precedes any filing under the Constitution or 42 U.S.C. §§1981 and 1983. Plaintiffs have duly filed their claims with the Equal Employment Opportunity Commission and

[1] Defendants suggest that only three of the plaintiffs have adequately cross-filed their claims with the New York State Division of Human Rights, thereby triggering the 300 day filing period under Title VII when a state deferral agency is available. However, by agreement between the Equal Employment Opportunity Commission and the New York State Division of Human Rights a filing of a complaint with the Commission constitutes a filing of that same complaint with the Division. A copy of this agreement is attached hereto and made a part hereof as Appendix A.

have duly received Right to Sue Notices.[1] Plaintiffs may properly pursue remedies for employment discrimination both in the federal and state forums simultaneously. In fact, Congress anticipated overlap of remedies between federal and state laws in the area of employment discrimination. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Voutsis v. Union Carbide, 452 F.2d 889 (2nd Cir.1971) cert. den. 406 U.S. 918 (1972); Egelston v. State University College at Geneseo, Slip Opinion No. 1050, Second Circuit, June 7, 1976.

All party defendants are properly named in this lawsuit. While individual defendants James Reed, Fred Lapple and Gabriel Russo were not specified by name, individually, in the complaint filed by the plaintiffs with the Equal Employment Opportunity Commission, the governmental units to which they belong were named. The individual defendants

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[1] The three persons who did not file their claims with the Commission are properly joined in this lawsuit with the claims of the persons who did file with the Commission. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). These persons may also sue under the Constitution and 42 U.S.C. §§1981 and 1983.

have had notice of these charges from the initial filings with the Commission and/or the New York State Division of Human Rights and cannot now successfully disclaim knowledge and notice of the claims. Of course, notwithstanding the inclusion or exclusion of the individual defendants in proceedings before the Commission, the individual defendants are properly sued under 42 U.S.C. §§1981 and 1983 and the Constitution.

Plaintiffs underscored to the lower court that defendants' arguments against constituting the lawsuit a class action were premature-that plaintiffs are entitled to proceed, as contemplated by Federal Rule 23, with depositions, production of documents and answering of interrogatories promptly so that information from which the definition and designation of the class can be made is available. The lower court in summarily dismissing the complaint without explanation did not reach the question of the appropriateness of the case for class action treatment.

Plaintiffs, in their pleadings, set forth the necessary allegations for the maintenance of this lawsuit as a class action. The facts alleged demonstrate that this case is appropriate for class action treatment just as similar employment discrimination cases have been previously constituted class actions. See for example, see Parmer v. National Cash Register Co., 346 F.Supp. 1043 (D.C. Ohio 1972)-

employee who alleged that she was discriminated against on the basis of sex by being discharged from her employment was constituted the class representative for women employees, present and prospective; Sagers v. Yellow Freight System, Inc., 58 F.R.D. 54 (N.D. Ga. 1972)-class constituted of all black employees of the defendant company within specified geographical area; Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F.Supp. 305 (D.C. N.Y. 1972)-class established of all present and prospective female employees; Kohn v. Ryall, Koegel & Wells, 50 F.R.D. 515 (D.C.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2nd Cir. 1974)-woman law student found to be adequately representative of all women who have been or would be qualified for legal positions with the law firm and who have been or would be denied employment because of sex; Gilbert v. General Electric Co., 59 F.R.D. 267 (D.C. Va. 1973)- class constituted of all women affected by General Electric's discriminatory denial of benefits, Glus v. G.C. Murphy Co., 329 F.Supp. 563 (D.C. Pa. 1971)-class constituted of all women employees of defendant company; Monell v. Department of Social Services of the City of New York, 357 F.Supp. 1051 (D.C.N.Y. 1972)-suit by women employees working for two separate agencies of a municipality that challenged the legality of a maternity leave policy could be maintained as a class action on behalf of all women employees of other agencies of the municipality; Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3rd Cir. 1971)-retired employee

designated class representative for actual and potential Negro employees of the company.

The only authority which defendants can muster to suggest that this lawsuit should not proceed as a class action is Smith v. North American Rockwell Corp.-Tulsa Div., 50 F.R.D. 515 (D.C. Okla. 1970). The facts in that case are entirely different from the facts of this case. Plaintiffs in the Smith case were each employed in separate divisions or operating units of a huge manufacturing concern. The court concluded that the terms, conditions and privileges of employment would be sufficiently different from one major unit of this corporation to another so that there would not be the necessary commonality to maintain a class suit.

The Monroe County Department of Social Services is one compact unit of Monroe County government. All of the plaintiffs are employed at the same location, they work on the same subject matter, they are in the same recruiting pool, progression line for promotions and transfers, they are employed under the same pay scale and are carried in the same budget unit. All terms, conditions and circumstances of employment for employees of the Monroe County Department of Social Services are the same. The plaintiffs properly bring this lawsuit on behalf of all present, past and prospective employees of the Monroe County Department of Social Services.

The additional authority appellees cite in support of

their attack on the class action, Mosley v. General Motors Corp., 63 F.R.D. 127(D.C.Minn.1973)has been reversed on this point /by the Eighth Circuit Court of Appeals, Mosley v. General Motors Corp., 497 F.2d 1330 (8th Cir. 1974).

CONCLUSION

For the foregoing reasons, and for the reasons previously set forth in the Brief of Plaintiffs-Appellants, August 12, 1976, plaintiffs request the court reverse the decision of the lower court finding that plaintiffs' complaint states claims against all defendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§1981, 1983, the United States Constitution, the First, Ninth and Fourteenth Amendments.

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October 1, 1976
Rochester, New York

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Plaintiffs-Appellants was served on the defendants by my causing two copies thereof to be mailed to each attorney for the defendants, Joseph Pilato, Esq., Monroe County Office Building, Rochester, New York 14614 and Frank Celona, Esq., Monroe County Department of Social Services, 111 Westfall Road, Rochester, New York 14620, this 1st day of October 1976.

Emmelyn Logan-Baldwin

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October 1, 1976
Rochester, New York

Appendix A

NEW YORK STATE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

MEMORANDUM OF UNDERSTANDING

In order to provide for efficient cooperation and coordination of enforcement activities under Title VII of the Civil Rights Act of 1964 (the "Act") and the Human Rights Law of The State of New York the Equal Employment Opportunity Commission (the "Commission") and The New York State Division of Human Rights (the "Agency") hereby express adherence to the following procedure for the processing and investigation of charges of discrimination in employment:

1. When an employment discrimination charge is filed with the Agency, the Agency will furnish the charging party with literature prepared by the Commission describing his federal rights and advise him, at some time before the expiration of the 60- or 120-day period of deference provided by section 706(b) of the Act of his right to file a complaint with the Commission. If the charging party at the time of filing a charge with the Agency, or at any other time, indicates to the Agency that he wishes to file with the Commission, the Agency will notify the Commission (on a form to be supplied by the Commission). Pursuant to Section 705(f), the Commission by this agreement designates the Agency as a State Office of the Commission for the sole purpose of receiving such charges on behalf of the Commission, and the Agency agrees to receive such charges. The Commission will consider the charge to be filed with the Commission at the expiration of the period of deference. Where the charging party has indicated that he wishes to file with the Commission and the case is terminated by the Agency, the Commission will be notified by the Agency of the nature and basis of the disposition (on a form to be supplied by the Commission). The Commission will consider the charge to be filed with the Commission at the time of such state agency termination. Pursuant to Section 705(f), the Commission by this agreement designates the Agency as a State office of the Commission for the sole purpose of receiving such charges on behalf of the Commission, and the Agency agrees to receive such charges. The Commission will consider the charge to be filed with the Commission when the state agency terminates its proceedings.

2. When the Commission receives a charge which must be deferred to the Agency under section 706(b) of the Act, the Commission will send by registered mail a copy of the charge, or the

original, where requested, to the Agency, together with all other available information on the case. The Agency hereby designates the Commission to serve as its agent for the purpose of the receipt of charges and agrees that the period of deference provided by section 706(b) commences to run when the charge is sent. The Commission will notify the charging party of the deferral and the date thereof and will advise him that he should cooperate with the Agency in its handling of his case and that the Commission will consider the charge to be filed with the Commission at the expiration of the period of deference unless it is notified by the charging party that the charge has been settled to his satisfaction. The Agency will periodically inform the Commission (on a form to be supplied by the Commission) of all actions taken on charges deferred to the Agency. If the Agency terminates its proceedings prior to the expiration of the period of deference the procedure outlined in paragraph 1 will apply.

3. Upon the expiration of the period of deference the Commission will consider the charge to be filed with the Commission. The Commission will develop and forward to the Agency standards of investigation, finding, and remedy in certain classes of cases. In those classes of cases the Commission may temporarily refrain from actually processing the charge, and will so notify the Agency, if it appears that the Agency will meet those standards in the processing of that case. In addition, if the Agency consistently meets those standards of case processing the Commission may adopt the investigative findings of the Agency when they result in a formal written finding that cause exists to believe that an unlawful employment practice exists; and may approve Agency Conciliation Agreements or Cease and Desist Orders when they are accepted by the charging party and when they effectuate the basis remedial purposes of the Commission. The Commission will assure, however, that, where the charging party wishes to assert his federal rights or where the interest of effective enforcement of Title VII requires it the charge will be processed promptly. Provided, however, that such procedures in no way shall detract from the responsibility of the Agency under State law.

4. In the course of its investigation of a charge the Commission shall have access to relevant information in the possession of the Agency, including its investigative files with respect to the same or related cases, and for this purpose representatives of the Commission will be permitted to copy or obtain copies of pertinent documents, and to utilize the same in proceedings under Title VII, provided that information on conciliation attempts will not be made public. The Commission shall in like circumstances grant to representatives of the Agency similar access to relevant information in its possession. The

Agency may utilize such information but may not make it public except as part of enforcement proceedings under its statute. To the extent permitted by law and by applicable policies and regulations similar access will be granted also to information in the possession of other federal agencies. However, the Commission and the Agency agree that information on conciliation attempts will not be made public where such disclosure would be contrary to the statutory provisions or policies applicable to conciliation proceedings. Provided, however, the sharing of information on conciliation by the Agency and the Commission with each other shall not be deemed to be making such information public.

5. Where the same or related charges are pending before the Agency and the Commission, the Commission and the Agency will endeavor through consulation and mutual assistance to provide for efficient processing of the charges. The Commission may permit personnel of the Agency to accompany Commission personnel on investigations and conciliation of cases falling within their joint jurisdiction. Provided, however, that such procedures in no way shall detract from the responsibility of the Commission under Federal law. The Agency will permit personnel of the Commission to accompany and observe Agency personnel on investigations and conciliation of cases falling within their joint jurisdiction. Provided, however, that such procedures in no way shall detract from the responsibility of the Agency under State law.

6. In accordance with section 709(b) the Commission may with the concurrence of the Agency designate the Agency or its employees to act for it in the course of investigation or conciliation and may reimburse the Agency or its employees for such services.

7. Settlement of a case whether or not the case was deferred by the Commission or filed with the Agency on terms satisfactory to the Agency shall not be deemed by the Commission dispositive of the charging party's rights under Federal law inless the Commission is made a party to the agreement or the charging party has accepted the terms as equitable and executed a written voluntary waiver (form to be supplied by the Commission) evidencing such acceptance.

8. Upon request from the Commission the Agency will provide the appropriate Field Office of the Commission with a copy of all charges or complaints filed with it under State law in addition to notifying the charging parties of their Federal rights as provided in paragraph 1 above.

9. If a charge is filed by a member of the Commission alleging an unlawful practice occurring within the jurisdiction of the Agency, the Commission will notify the Agency. If the Agency requests time to process the charge the procedures outlined above will be followed.

10. The Commission and the Agency each shall have the power to cancel this Memorandum of Understanding at any time by mailing written notice to the other's principal office. Upon such cancellation, neither the Commission nor this Agency shall have any further obligation under, or on account of, this Memorandum of Understanding. Except that, subject to appropriate audit, the Commission shall make any payments due under existing contracts for work actually performed prior to such cancellation.

Irwin M. Sabell
Title: Commissioner
Agency: New York State Division of Human Rights

William H. Brown III
Chairman
Equal Employment Opportunity Commission

June 20, 1972
Date

July 6, 1972
Date

Approved by Commission
6/7/71